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Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 41.

GEO. D. CRAGIN, APPELLANT,

versus

C. L. POWELL ET ALS., APPELLEES.

J. D. ROUSE,
WM. GRANT,
Counsel for Appellant.

L. GRAHAM & SON, PRINTERS, 101 GRAVIER ST., N. O.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 41.

GEO. D. CRAGIN, APPELLANT,

versus

C. L. POWELL ET ALS., APPELLEES.

THE PLEADINGS.

Suit was filed in the Nineteenth Judicial District Court for the parish of Terrebonne, State of Louisiana, by Christian L. Powell, Joseph O. Ayo and Ludger Gaidry, owners of the east half of the southwest quarter of section ten, the east half of section fifteen, the west half of the southwest quarter of section fourteen, the east half of the east half of section twenty-two, and the west half of section twenty-three, all in township twenty, south of range seventeen east, containing 635.58 acres, against Geo. D. Cragin, for the purpose of establishing the boundary line between the above lands and those of said Cragin.

The material averment of the petition filed in the cause is, "that the boundaries between the property of the petitioners aforesaid and that of the contiguous property of said Cragin have never been determined since the proprietorship of the petitioners commenced; and if thebounds have ever been formerly fixed they are no longer to be seen, and these petitioners desire to compel the said Geo. D. Cragin to fix the limits," etc.

The prayer is that judgment be rendered fixing the lim-

its and compelling defendant to deliver possession of the lands claimed unto the plaintiffs. On the 30th day of June, 1880, Cragin filed his petition and bond for the removal of the cause to the Circuit Court of the United States for the District of Louisiana, on the ground of diverse citizenship. On the 12th of July following an order of removal was granted by the judge of the State court. Record, pp. 1–7.

The record was duly filed in the circuit court, and on the 19th day of November, 1880, it was ordered, on the motion of Cragin's attorneys and after argument, that the cause be proceeded with as one in equity. R., p. 8.

Thereupon the defendant specially demurred to the petition, on the ground that the lands alleged to be contiguous to those of plaintiff's were not described. R., p. 8.

The demurrer was sustained, with leave to complainants to file defendant's deed for such lands. This was done, but otherwise no amendment was made. R., p. 9.

The defendant then answered, alleging that he and those through whom he derived his title had possessed the lands included in his deed by well-defined boundaries for more than thirty years, and that it was not necessary to fix the boundaries. R., p. 14.

Thereupon the court, on motion of counsel for complainants, appointed Benjamin McLaren, a surveyor, to make a survey of the property for the purpose of fixing a boundary. R., p. 15.

McLaren reported the result of his survey, with maps, etc., showing the situation of the property according to his theory, which will be found in the record, from page 16 to 28. Opposition to his report was duly filled by the defendant, and the defendant also amended his answer, alleging as follows:

1st. That the lands of the respondent, as well as those

claimed by complainants, formed parts of the subdivisions of township No. 20 of the public domain of the United States according to the official survey, and that respondent's vendors purchased a portiou of his land from John Bach, to whom patents issued on the 19th day of July, 1844; a portion from Wm. Craig Mylene, to whom patents issued on the 1st day of February, 1840, and a portion from Elisha Stevens, who acquired the same by patent, December 6th, 1844.

2d. That complainants acquired their lands from the State of Louisiana, to whom the same had been granted by donation from the United States, as swamp land, under the act of March 2d, 1849.

3d. That respondent's lands were noted on the township map as located on Bayou Four Points, and were patented as so located, and as being above overflow and fit for cultivation; while those donated to the State of Louisiana, and since purchased by complainants were desigignated as swamp lands, unfit for cultivation.

4th. That said patentees, through whom respondent acquired his lands, went into possession thereof about two years prior to the issuance of said patents under valid entries; and that they and their grantees, including respondent, have ever since continued to occupy and cultivate said lands; that their possession has been open, public and undisputed, in good faith, as owners under just titles, for more than thirty years prior to the bringing of this suit, and that they are protected by the prescription of ten and thirty years.

5th. Respondent is advised that complainants claim there is an error in the original survey, which, if corrected, will place complainants' lands where those of this respondent are located under the original survey, thus giving them the high lands now occupied by respondent, in

lieu of the swamp lands purchased from the State by complainants.

6th. That in 1849 the United States government began a system of resurveys of townships, west of the Mississippi river, on account of alleged errors in the original survey, but that the work was discontinued when it reached township twenty, it being deemed best not to disturb persons in possession on account of such errors.

7th. That if complainants' lands are located on said bayou then they were not swamp lands, and did not pass to the State of Louisiana under the act of 1849.

8th. That respondent's lands, being held and claimed by his grantors at the date of the passage of the act of 1849, were excepted from the grant to the State by the second section of such act. R., p. 22.

Replication was duly filed and the cause put at issue.

THE EVIDENCE.

The report of McLaren shows that the property of the complainants consists of a strip of tidal-overflowed land, patented to Samuel Wolf, by the State of Louisiana, in 1878, bounded on the west and north by property of defendant, patented to Morris Bach by the United States; and that both titles call for areas in accordance with the plat and field notes of G. F. Connolly, made in 1837.

It further appears that these original surveys were so erroneous that in 1848 the surveyor-general instructed Thos. H. Weightman to make an examination of the whole matter. Pursuant to his commission Weightman recommended a resurvey of the work done by Connolly and others. A resurvey was accordingly begun by Joseph Gorlinski in the townships above and continued down to the northern line of township twenty, in which are situated the lands in dispute.

But here the system of resurveys was discontinued,

solely because "the confusion and complications existing amongst the Louisiana surveys," developed up to that time, threatened to affect the area of tracts of land already sold by the United States, and to thus disturb vested rights, the commissioner of the land office declaring, in a letter to the surveyor-general of Louisiana, that "there is no conjecturing the extent to which such development may be made." See his letter, R., p. 58.

McLaren further reports that he ran preliminary lines in order to find marks of an old line of agreement with the topographical features of the map, but that he utterly failed to find any section-corner or trace of any line that had ever been run to accord with any map. Failing to discover any traces of the official survey he next proceeded to examine the lines of section 37, as run by Gorlinski in his resurvey of township 19 above. He then proceeded to lay off the subdivisions of township 20 and to locate the lands in dispute, but all his lines were drawn from Gorlinski's resurvey of township 19, based solely upon the mile-posts established at the southern limit of that township, See report, R., p. 16.

Map No. 1, at page 22 of the record, shows the details of the survey, and map No. 2 the location of the lands of Cragin, according to the government survey, and of the complainants' land according to the present survey.

By the Gorlinski survey, which is followed by McLaren the eastern tier of sections of township 20 lose fully one-half of the area given them in the official plat.

By the official survey Bayou Four Points passed through Cragin's lands in sections 15 and 22; by the McLaren survey it is made to pass through complainants' lands in sections 14 and 23.

In his testimony McLaren says that he failed to find any marks of the original northern boundary of township No.

20, but located it where the field notes of Connolly showed it should be; yet he says (rec., p. 43) that he does not know how may chains the line of the township extended east or west of Bayou Four Points, and he admits that he used *Gorlinski's field notes and not those of Connolly.*

He did not establish the eastern or western terminus of the township.

In his opinion it is doubtful if Connolly made a real survey of township 20. The witness admits that he was guided by the theory of Gorlinski in his corrective resurvey of the township above, and that according to that theory township 20 would lack half a mile of being six miles square, thus leaving a deficiency of half a mile to be taken from the east side.

From this evidence the court was not satisfied with the report and recommitted the matter to the surveyor. R., pp. 41-7.

McLaren accordingly made a supplemental report, accompanied by maps, as found at pp. 27-28 of the record.

In regard to the last report he declares, when examined as a witness, that the same was made from the field notes of his first survey, he not having gone on the lands since, and that his former testimony as to the first applies to the last report. But he adds that his reports were based on the Connolly survey, and that he identified an original corner, an iron post and another point on the right bank of Grand Caillou, also a four mile post. R., p. 47.

The evidence of C. L. Powell relates mostly to the condition of the land in dispute as to cultivation. He admits that Cragin cultivates land both above and below that in dispute. He claims to have discovered the error in the township surveys while making a survey of the Dulac plantation for Mr. Cragin. R., p. 32.

McLaren, at p. 42, says the greater portion of the land in dispute has been cleared and is under cultivation.

Manuel Smith, a witness for defendant, testifies that he is fifty years old, was born on Dulac plantation and that the lands on Bayou Four Points have been cultivated by Pelton, who sold to Cragin, since he can remember anything. R., p. 49.

Wood was cut off the land in Mr. Pelton's time, and since then a part of the land has been cultivated, says R. Wilson, another witness. R., p. 52.

Samuel Cragin says defendant has had the land on Bayou Four Points, to the extent of from two to five arpents, under cultivation for a distance of three miles from the sugarhouse to Cenas, below the land in dispute, since the purchase from Pelton, for the greater portion of the time, the lower end having been cultivated all the time; and that no one but defendant's lessees has occupied any part of the land during that period. R., p. 55.

Upon the pleadings and evidence the court confirmed the report of the surveyor and fixed the boundary thus established, and divided the costs of the proceeding. R., p. 60.

ASSIGNMENT OF ERRORS.

1st. The court erred in confirming the report of the surveyor and fixing the boundary line as therein set forth.

2d. The court erred in granting any relief to complainants upon a survey correcting alleged errors in the government survey, and divesting defendant's possession acquired under the official survey by purchase from the United States.

3d. The court should have remitted the complainants to an action of ejectment at law to vindicate their claims, as the facts developed at the trial did not warrant relief in equity.

4th. The court erred in awarding to complainants the high lands purchased by defendant in lieu of the swamp

lands, unfit for cultivation, acquired by them from the State of Louisiana.

5th. The court erred in not entertaining defendant's pleas of prescription.

ARGUMENT.

I.

The greater portion of the lands in the southern part of the State of Louisiana, bordering on the gulf, consists of trembling prairie, or marsh, and cypress brakes, at all times too wet for cultivation, and often covered with tidal waters or an overflow from the fresh water streams. Extending inland from the gulf are bayous, which rise and fall for a great distance with the tides. By a deposit left on the banks from this overflow a strip of land has gradually been formed on each side of the bayous, which becomes narrower near the gulf, in some instances not exceeding two arpents in depth. This land is generally above overflow, and is the only portion of that region fit for cultivation or of any value.

In 1837 a survey of township twenty, in the parish of Terrebonne, was made by one Connolly, a government surveyor, who returned a plat thereof into the office of the surveyor-general of Louisiana. The survey, as required by law, noted the existence of bayous, the character of the lands, etc. Relying on the information thus given, Morris Bach entered those parts of sections fifteen and twenty-two, and other subdivisions below, which appeared to be located on Bayou Four Points, and obtained a patent therefor from the United States in 1844.

Except so far as they contained dry land fit for cultivation these lands were entirely valuless. He and his grantees have remained in possesion of the lands ever since, cutting wood from a part of them for the use of the

Dulac plantation and cultivating the rest. The present defendant came into possession of the lands at the time he purchased the Dulac plantation, January 31, 1870.

In 1878 C. L. Powell, who was then employed by Cragin to make a survey, discovered, as he thought, an error in the government survey, whereby it would appear that the portions of sections 15 and 22, patented to Morris Bach, were not in fact located on Bayou Four Points, and he induced Samuel Wolf to purchase those parts of sections 14 and 23, which in his opinion were entitled to usurp their location. Being placed on the government survey as swamp lands they had been certified to the State, and the acquisition was made for a small sum of money. Wolf then transferred his title to Powell and his associates, who bring this suit.

It may be admitted that the Connolly survey was what is called a mere paper survey, and in every way erroneous, as were all the surveys west of the Mississippi. Indeed, McLaren testifies that it is doubtful whether an actual survey of township 20 was ever made by Connolly. Certainly the survey made by McLaren justifies this opinion, for, although he claims to have found where Connolly's lines ought to be, they do not fit the township plat returned in the office of the surveyor-general in 1837. This plat gives a full township six miles square, whereas McLaren finds, from points which he claims to have identified as those established by Connolly, notably the fourth mile-post, that there is a deficit on the east side of fully half a mile.

We think, however, that he is in error in saying that he found any of Connolly's lines or points of departure, for in his first report of the survey made to the court he distinctly says that Gorlinski, who made a resurvey of the township above (19), claims to have identified the lower

(official) line of the lower front corner of the Louis Cossier grant, and also to have found the old three-milepost; but that he (McLaren) "failed to discover any traces of the official survey." See report at pp. 16–78.

In his supplemental report, at p. 27, he simply attempts to show by maps the location of the lands in dispute more clearly.

In his testimony he says he did not find the corner of the township boundary, but found two neighboring corners, one set by Gorlinski and the other by Connolly. The boundary by Gorlinski ran from the line, "and from this point I settled the township boundary." (Record, p. 42.) But he does not explain what he meant by "two neighboring corners," which certainly were not township corners.

Again, he testifies that he established the boundary in the same place. Connolly's notes showed it should be by the outside points of Gorlinski and Connolly, but at the same time admits that he actually used Gorlinski's notes, and does not recollect whether they agreed with those of Connolly. R., p. 43.

Again, he says he made the survey according to the theory adopted by Gorlinski in township 19. R., p. 45.

Being recalled, after filing his supplemental report, he declared that he had made the new plats from his old survey, and had not been on the ground again, and that his former evidence applied to his last report as well as the first. He adds that he found the four-milepost from Connolly's and Gorlinski's field notes. R., p. 47.

It seems patent that the survey of McLaren was made up wholly from Gorlinski's notes, though it is quite likely that he also saw those of Connolly.

He evidently took Gorlinski's points as a basis of his survey, for if he had taken the official survey in the land office as a guide, township 20 could not have been cut

down one-twelfth in area, as it was according to the re-survey of Gorlinski.

It is thus apparent, *first*, that the lines of township 20 have not been established as they were in the official government plat made by Connolly; and, *second*, that a new township has been created for the purpose of this suit, of a less area than the old one, necessarily displacing the established official subdivisions of the original government survey.

II.

The rules prescribed by law for the survey of public lands are embodied in the Revised Statutes, section 2395 to section 2413, inclusive.

1. Public lands shall be divided by north and south lines, run according to the true meridian, and by others crossing them at right angles, so as to form townships six miles square.

2. The corners of townships shall be marked out, and each distance of a mile shall also be marked.

3. The townships shall be subdivided into sections containing as near as may be six hundred and forty acres.

4. Where the exterior lines of a township exceed or do not extend six miles, the excess or deficiency shall be specially noted, and added to or deducted from the *western* and *northern* ranges of the sections.

5. The surveyor shall note in his field-book the true situation of all the watercourses, etc., over which he may pass. Section 2306.

6. Departure from this method of survey may, under special circumstances, be authorized by the president (section 2407), or by the secretary of the interior (section 2409).

The survey of Connolly, as returned into the office of the surveyor-general, was in exact conformity with these re-

quirements of the law, and the official plat established a full township. No deficiency in its area was noted.

Perhaps the secretary of the interior, or the surveyor-general under his authority, might have authorized a departure from the terms of the statute in laying out the township originally, but the courts cannot exercise this authority for the purpose of correcting a supposed error in an official survey.

The early case of *Clements vs. Brown*, *3 H. 650*, which seems to have sanctioned such practices, has been overruled in *Gazzam vs. Phillips*, *20 H. 372*, where, upon a full consideration of the question, it was held that the courts cannot correct or reform an error in a public survey when vested rights have been acquired under it.

III.

Where it is doubtful whether an actual survey has been made, or where, if made, it is so erroneous that its lines cannot be reëstablished substantially as set forth in the original official survey and plat under which the government has given titles, the possession of those who have purchased on the faith of such survey ought not to be disturbed, especially where, as in this case, the inducement to purchase was the fact that the lands were located on a particular watercourse and were valuable only because of their situation.

Certainly it is not the province of courts of equity to take defendant's valuable property and give it to the complainants, in the place of their worthless swamp land, in a suit merely to fix boundaries.

Courts of equity are not bound to assist a party in obtaining an unconscionable advantage over another. *Miss. Railroad Co. vs. Cromwell*, *91 U. S. 643*.

Says Chief Justice Marshall, in *Taylor vs. Brown*, *5 Cranch. 234:* "A person who acquires land knowing that

it covers a portion claimed by another will be held either as not meaning to acquire the land of the other, or he will be considered as a man watching for accidental mistakes and preparing to take advantage of them. What is gained at law by a person of this description will not be taken from him, but equity will not aid his views."

Powell discovered, while making a survey for Cragin, the supposed errors in the government survey, through which he saw a chance to acquire the valuable land of Cragin. He caused Wolf to purchase some worthless swamp land, covering, as he thought, that of Cragin, and had it transferred to himself and his two associates for the very purposes of this suit.

While we admit that in a suit at law it is not competent to show that land certified to a State as swamp land, under the act of 1849, is not in fact such under the rule laid down in *French vs. Fyan, 93 U. S. 169*, yet this being a suit in equity the rule does not apply. See *Doolan vs. Carr, 125 U. S. 618*.

But whether this defence may be urged as good in equity *per se*, or not, is immaterial, for the record discloses a state of facts rendering it unjust to grant complainants the relief they ask.

IV.

This action is brought under the provisions of the Civil Code of Louisiana, title v, beginning at article 823, which provides for the *fixing of limits and the surveying of lands*.

Article 824 defines the action as one of boundary, derived from the same source as the action of partition. Article 825 declares that the action of boundary, like that of partition, cannot be prescribed against.

But article 852 provides that "if the person whose title is of the latest date, or those under whom he holds have

enjoyed, in good or bad faith, undisputed posession during thirty years of any quantity of land beyond that mentioned in the title, he will be permitted to retain it; * * * for although one cannot prescribe against his own title he can prescribe beyond his title or for more than it calls for; provided it be by more than thirty years' possession."

Whether this provision applies in favor of one holding the elder title has not been expressly decided in the courts of Louisiana, but the general right of a person to prescribe without discussing the principle, has been recognized in at least two cases. *Zeringue vs. Harrang, 17 L. 349; Fredrick vs. Brulard, 6 A. 382.*

The last clause of this article announced the general rule that *any* possessor may prescribe for lands beyond his title in the action of boundary.

According to one of the witnesses, who was born on Dulac plantation and is fifty-five years old, and another sixty-four years old, who resided there fifty years, the lands on Bayou Four Points have been cultivated by Pelton and by Cragin, who purchased from him, ever since they remember anything. Wood was also cut there for the use of the plantation.

When it is considered that Pelton and Gragin owned the lands both above and below those in dispute, and that there was an impassable marsh on each side of the bayou beyond the highlands, their actual possession of the lands in dispute seems clearly established, though not enclosed by fences.

It is a sufficient act of possesion if a person enters upon land under color of title and cuts wood or raises a crop. *Elliott vs. Pearl, 10 Pet. 412.*

Possession is acquired *corpore et animo.* One who enters a farm acquires the possession of the whole, though he

can occupy but a small spot. *Henderson vs. St. Charles, 7 Martin, N. S., 122.* The cutting of wood under claim of title is an act of possession. *Baker vs. Torte, 11 La. 439.*

Cultivation and enclosure are not necessary to constitute possession. *Prabst vs. Brock, 10 W. 519; Green vs. Witherspoon, 37 A. 751.*

V.

Complainants' real object is to dispossess the defendant, and their remedy is at law by the petitory action (ejectment). In this form of action prescription may be pleaded, unaffected by the special provisions relating to the action of boundary. As the State acquired the land claimed by complainants as swamp land, under the act of March 2, 1849, the State's title was one *in presenti* under that act, and related back to the date of the grant, though the land was not listed to the State until 1878. *Ham vs. Missouri, 18 H. 186; French vs. Fayan, 93 U. S. 163.*

Prescription ran against the State after the date of the grant, as well as against those who purchased from her; for whatever the rule may be in other States, the State of Louisiana is not excepted from the effect of the statute of limitations.

Prescription, says the Supreme Court of Louisiana in *Pepper vs. Dunlap, 9 A. 137*, is a mode of acquiring property under article 3457 of the civil code. Under the Spanish law property could be acquired by prescription against the crown; citing *Sanchez vs. Gonzalez, 11 Martin La. 210*, and *Mitchell vs. U. S., 9 Pet. 760.* And in the Civil Code of Louisiana there is no exception in favor of the State.

The same rule was reaffirmed in the *Succession of Zacharie, 30 A. 1260.*

The prescription, therefore, of ten years, under article

3478 of the Civil Code, would be a good defence to a petitory action, the defendant being a possessor in good faith.

On the other hand, if this suit is treated as one of boundary, the prescription of thirty years applies, whether defendant is a possessor in good or bad faith.

But we do not think the real issue in this case is to be determined upon the narrow rules governing the action of boundary.

This court has to deal with a question of public importance, namely, the integrity of a public survey of the United States.

If it be true that the public survey upon which the United States has made the sales and grants of land involved in this contract was never in fact made, or if it was so erroneously made that it cannot now be reëstablished so as to conform to the original plat, this fact must put an end to the suit, as the court, while it has power to establish original lines, has no authority to make a survey of its own and create a boundary.

On the other hand, if there was a survey in fact the courts must follow it as nearly as possible, making some allowance for variations in the magnetic needle; but it is not justified in such a departure from the original as to disregard it or alter its substance.

Here the court has created a township containing one-twelfth less in area than prescribed by law, or than is contained in the official plat, and conforming, as the surveyor admits, to none of its topographical features.

The effect of this is to displace the whole system of public surveys west of the Mississippi river in Louisiana, and render titles unsafe. The extent of this evil cannot be conjectured, but it is too manifest to be disregarded.

Wherefore appellant prays that the decree appealed from be reversed and set aside, and that complainants' bill be dismissed at their cost.

Respectfully submitted,

J. D. ROUSE,

WM. GRANT,

Counsel for Appellant.

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J. S. WHITAKER,

Counsel for Appellees.

On the 1st of November, 1880, Christian L. Powell, Joseph O. Ayo and Ludger Guidry, residents of the parish of Terrebonne, State of Louisiana, being owners of certain lands, to wit: 635 58-100 acres, acquired from the State of Louisiana, brought in the Nineteenth Judicial District Court of said parish, an action of boundary against Geo. D. Cragin, the

owner of contiguous lands, setting forth that the boundaries between said petitioners' lands and those of defendant have not been determined, or if previously fixed, are no longer to be seen, and that defendant being unwilling to fix said limits or boundaries, they have been obliged to bring suit to compel him to do so. The proceedings taken are strictly in accordance with the provisions of the new Civil Code of Louisiana, Arts. 823, 840, 841, 845, and decisions of our Supreme Court, Sprigg vs. Hooper, 9 Rob. 248; Tucker vs. LeFebre et al., 5 Ann. 122.

Defendant appeared in State court only for the purpose of removing the cause on the plea of citizenship in another State to the United States Circuit Court, and the same was so removed.

The first action taken in the case was a demurrer filed December 16, 1880, to the effect that certain averments were not set forth in petition with sufficient certainty to enable defendant to answer.

On the 7th April thereafter, with leave of court, plaintiff filed the deed of sale of Samuel Cragin and wife to George D. Cragin as a full response to said demurrer, pp. 9–14, and on the 19th April thereafter defendant, setting forth his long tenure of the property, filed his answer pleading the general issue.

On the 2d May, 1881, petitioners moved the court for the appointment of a surveyor, and by mutual consent Benjamin McLeren, United States Surveyor, was selected as a competent party for the purpose. R. p. 15.

On the 6th June, 1881, he filed his report. R. pp. 16–22.

On the opening of the court November 7, 1881, petitioners moved for a rule on defendant to show cause, on the 9th November, 1881, why the report of the surveyor should not be approved as being a true and correct survey of the premises. (R. p. 26.)

Thus had this case progressed when, on the 19th November, 1881, *the return day of the rule above* referred to, defendant by his counsel appeared, and on setting forth that "this cause was properly of equitable cognizance, and should proceed as in equity," obtained an order, notwithstanding the opposition of petitioner's counsel for placing same on equity docket and for process accordingly, thus summarily disposing of rule taken and then returnable for confirming surveyor's report.

By the same order defendant was granted two weeks' time to amend his answer and like permission was given to petitioners. (R. p. 8.)

On the 3d December defendant files amended answer, setting forth that Township No. 20, originally belonging to the United States, patents issued to various parties, and among others to G. M. Bach, Wm. C. Mylne and E. Stevens, from whom his title was derived.

2d, That complainants derive title from the State of Louisiana, and that the State derived under Act

2, March, 1849, both parties acquiring from the same source.

3d, That on original survey his lands, derivable by patent as above, were noted as located on Grassey Bayou (now called Four Points)

4th, Pleads the prescription of ten and thirty years.

5th, That under complainants' claim there was error in original survey, which being corrected, will place their lands where those of respondent are located, giving them the high lands in lieu of the swamp lands purchased by them.

6th, That, in 1849, the United States began resurveys, but the work was discontinued when it reached township No. 20.

7th, That if located on Bayou Four Points, then complainant's lands were not swamp lands, and did not pass by Act of '49.

8th, That respondent's lands were excepted from the grant to the State by second section of Act of '49. R. p. 22.

After hearing evidence and argument of counsel on both sides, the court confirmed the report of the surveyor and gave decree fixing the limits of the two estates as prayed in original petition. R. pp. 60, 61.

We take it for granted that in an action for boundary, such as the present, the sole object is to determine and fix the limits between the respective

properties of the parties litigant, and this is all that the court has done by its decree in the present case.

Art. 841 (837), Civil Code, reads as follows: "It is the duty of the judge who has cognizance of suits on the subject of limits, to appoint surveyors to inspect the premises in question, and the court, on their report, ought to decide according to the titles of the parties and the plans which shall be presented to the court."

There is no question of title, for neither party disputes that of his antagonist, and when the allegations and prayer sufficiently indicate the action to be one of boundary, its character will not be affected by the prayer that the plaintiff be adjudged owner within boundary assigned him. Andrews vs. Knox, 10 An. 604.

Say the Court in Sprigg vs. Hooper, La. Rep. 9 Rob. p. 253: "We cannot, in an action of boundary, permit the title to the property to be litigated when it is only proposed to fix a line or boundary between the adjoining claims."

Again, the same case decides that where both parties claim under the United States, the controversy will be decided according to the laws of Louisiana (See answer of defendant, first and second grounds of defence, R. pp. 22, 23.)

"The limits must be fixed according to the respective titles of the parties." C. C. 845 (841).

In order to arrive at these limits or boundaries,

a survey became necessary, and at the request of counsel for plaintiff, Benjamin McLeran, a competent and well-known United States surveyor, was selected, and this with the full accord of all parties to the suit.

By reference to his report, filed June 6, 1881 (Record, p. 16), it appears, in the language of the surveyor, "both titles call for acres in accordance with the plat and field notes of the survey of G. F. Connelly, made in 1837," thus showing clearly that the surveyor was in possession and consulted the titles of both litigants at the time of making his survey.

Facts of the Case.

In 1837. G. F. Connelly surveyed the lands in Township 20, and his plat of survey is filed in this ca?e by both parties, both contestants relying upon it as the basis of their respective titles. In 1844 and 1847, G. M. Bach and others obtained from the United States, as per said survey, the patents to the lands now claimed and admitted to belong to defendant, through subsequent puachasers, who acquired from patentees. The most cursory examination of these lands, by the description in the several patents and the titles of defendant on file, and by tracing them on the plat, shows them to be totally distinct from those claimed and owned by the plaintiffs. There is nothing in the patents or titles on record and in evidence to show, by word or otherwise, any dis-

tinct calls designating their location; nothing given descriptive of the property, except the Township, the Section and the Range; nothing to describe the lands patented or conveyed, either as highlands or lowlands, swamp or overflowed lands, or as having upon them any water course or bayou. The plat in evidence contains upon its face the names of certain bayous as "Bayous Cailliou, Grassy, Salé and others, but the original patents and conveyances, apart from the plat, are silent upon the subject, except that defendant's title (R. p. 9–14) calls for land on Bayou Grand Cailliou.

Under Act of 2d March, 1849, the United States granted to the State of Louisiana certain swamp lands as were not claimed or held by individuals, and among them certain lands in Township 20, and on the 6th of May, 1852, under the second Section of said Act, the lands owned by plaintiffs in this suit were listed, selected and approved by the Secretary of the Treasury as swamp lands subject to overflow. See Document "F" (R. p. 30) and certificate of Gen. Baldy, Register of Land Office, on file. (R. p. 48.)

McLeran's Survey.

At this point we will consider the survey of McLeran. Mr. McLeran retraced the lines of the old survey from points not hypothetical, but found under the Field Notes of Connelly, and fixed the Township lines by reference to his approved surveys; following these lines of survey he found no error in the orig-

inal, except in the location of Bayou Four Points. This he has shown, not only by an original survey on the ground, but by a second explanatory report of survey made at the instance of the court. The survey is conclusive as to the location of the lands of both contestants.

While the law requires the Township to be surveyed six miles square, it is often necessary to make it either more or less. In the present case the distance is less on account of a lap in the re-survey of the township on the east side. This does not alter the position of the mile-posts on the line of the Township in question, because their position is determined by their distance from Grand Caillou. Thus, mile-post 3 and mile-post 4 are located where they were originally by the official Government Survey, and the interior sections containing the lands in dispute are located in reference to these points by courses and distances required in the official Government Survey.

The land was not sold as fronting on any bayou, but as being a certain part of a section in the township, the position of which was not dependent on the position of a bayou at all, but of the Section line, and as the sale was made prior to the Act of 1849, it was sold by the Government without reference to the character of the land, whether as swamp or high land.

Bayou Four Points was not meandered, while

Grand Caillion was, and a well identified corner on its banks was used in this survey to determine the boundaries of defendant's land. At least two of Connelly's corners were identified, and the position of the fourth mile post clearly determined by course and distance.

The only way we had in the present instance of knowing the lands inside of a section was by first finding the position of the Section lines, which McLeran has done, by locating them at the required distance from identified corners on the original official survey, and thus giving to these sections the same relative positions to Bayou Grand Caillion, to the Cossier grant and to the Township line, as were given in the Connelly survey.

As to the survey having made the longitudinal width of the Township five and a half miles; in one sense, this is true; in another, it is not. 1st. The sense in which it is true. It is true there is a lap made by the Township on the east side, which will put in conflict about one-half of the Eastern tier of Sections of one, and the Western tier of Sections of the other. This conflict of lines can only affect these tiers of Sections, and cannot be made to alter the other Section lines or change their place from where the Government official survey has put them. 2d. It is not true that the survey makes the breadth only five and a half miles; the width is six miles and the Township line is given as suryeyed by Foster

and Walker. This Eastern boundary line, as fixed in the Court survey, is the same distance from the meandered Bayou Grand Caillou as called for in the Connelly survey, and likewise the distance between the third and the fourth mile post, the last of which is located just where it was located in the survey of Connelly, and the Sections containing the disputed lands are located at the required distance from this point. These *Section lines* are the *governing calls* of the survey, and cannot, in justice, be disregarded because of an insignificant bayou which has been put down in error on the map.

PRESCRIPTION.

It is shown that defendant's property under his patents and titles lies within certain determinate limits, and under the evidence, takes in both sides of Bayou Four Points, until said bayou reaches the land of plaintiffs, where it continues South through said lands about a mile, and then passes into the lands of defendant, crossing the S. E. fractional division of Section 22, belonging to Cragin, and at the Southern and lower portion of this tract, then later joins the Bayou Lasere, and uniting with it, proceeds to the Gulf. Cragin may be able to trace his title in the portion he owns of the old domain of the United States to the date of the issuance of the patents to Bach in 1844, and yet this land had its metes and bounds fixed by the terms of conveyance, and the only question that can be considered here is,

when his possession commenced of the land beyond his actual bounds.

Martin Smith, a witness for defendant, says that he was twenty-four years of age when Port Hudson was taken, and that his memory goes back to that time. R. p. 50. He remembers that the bayou lands on this Bayou Four Points were cultivated by poor people, but gives no date whatever for this; only mentions one party known to him, one Ozie, as having gone there to cultivate two years before he gave his testimony. R. p. 52. This is the substance of his testimony as bearing upon the subject of Cragin's occupation, certainly too indefinite to found upon it any prescriptive right.

Richard Wilson, another witness for defendant, says Cenac's place is on lower line of Cragin's plantation, R. p. 53; this lower line is some distance below Powell's lines, and this fact is confirmed both by Powell, R. p. 33, and by Raby, R. p. 37. Wilson speaks of Creoles upon the land, but is unable to testify as to the time and place though he does say that the lands had been under cultivation for one or two years. He cut wood for his employers, but does not say when.

George Cragin, son of defendant, states that his father went into possession in 1871 or 1872, and that he had known the Dulac plantation since 1870 or 1871, p. 55. That the sugar-house was located above Section 15, p. 56. That he leased to Ozie in 1877 or

1878, and thinks Ozie had a lease as early as 1871, p. 57.

This is the substance of the entire evidence of defendant on the subject of prescription, and it is submitted that it sustains the plea of prescription, neither for ten nor thirty years, so far as relates to the acquisition by occupancy or acts of ownership of any property by defendant, beyond the metes and bounds of his original title. C. C. 852; 10 Ann. 604.

In this connection, we invite the attention of the Court to the testimony of Raby, Powell and McLeran, showing the recent character of improvements had upon the lands, as brought to the notice of the surveyor, and in the case of the two first, their statements from actual knowledge as residents in the locality.

EQUITY JURISDICTION.

It is certain that the objects of this suit were reached under the evidence the moment that McLeran filed his report under the action to compel the defendant to fix the limits between his property and plaintiffs', the true location of the respective properties manifestly appearing from his survey and said report.

There may, however, exist in these proceedings certain equities superinduced by the acts of one of the parties, through error or mistake on his part, that would authorize a court of equity to intervene. It is charitable to suppose that in error or mistake as

to the position of the Bayou Four Points, supposing his property to run on both sides of it throughout its course, when a portion of it ran through the lands of these plaintiffs, that Cragin has for some time past entered upon the Powell lands, and leased or cultivated some portion of them, and he may have been further led into this error or mistake, because on the plat of the Government survey a certain bayou appears to run through the lands described in the patents under which he claims, though, as before stated, no mention is made in those patents of this bayou, nor any plot referred to, nor is there any mention thereof in any subsequent transfer of his lands.

The survey of McLeran sets at rest the question relative to the actual place of Bayou Four Points, and it is evident, from his statements and plans, that the course of said bayou was never meandered by Connelly. Besides, it must be borne in mind that, with the exception of Bayou Grand Caillou, the other bayous of this Township and locality are comparatively of small moment, and navigable only by pirogues, and it is not surprising that Connelly should have not deemed their course or meanderings of importance to his survey. When we consider, moreover, the silence of the patents and deeds of conveyance respecting Bayou Four Points, as being a call or in any manner fixing the ownership of the lands patented or conveyed, we are led irresistibly to the conclusion that Mr. McLeran was correct in stating

that he did not believe this bayou was ever meandered. If, then, there is any equity in this case, bringing it within the review and consideration of a court of equity, it is a question resulting from the error into which Cragin has fallen through the misplacement of Bayou Four Points on the plot of the Connelly survey.

It is respectfully submitted that it would be manifestly inequitable to plaintiff to stay the proceedings in a case commenced on the law side, and on suggestion of counsel for the defence, ordered to be placed on the equity side, and the remedy of equity being mistaken, to send the party plaintiff to the common law remedy of ejectment.

It is further respectfully suggested that such course can hardly avoid hereafter that multiplicity of suits, the avoidance of which gives to parties, in cases of boundary, a right to remedy in equity.

The conclusion of the whole matter is, that the present is an action of boundary, purely and simply, and brought in a State Court where jurisdiction was undoubted, was transferred to the United States Court, which also, by law, was seized of like jurisdiction over it, and that certain matters have sprung up in the course of the proceedings and evidence, to-wit: certain errors and mistakes, superinduced by the act of the party defendant, which may or may not give jurisdiction to the equity side of the court.

The defendant has occupied the lands of the plain-

tiff beyond his own lines, through mistake as to the extent of his lines, but the evidence is too meager and indefinite to show for what length of time; certainly not long enough to perfect a prescription in his favor of either ten or thirty years, and his title remaining unchanged by any acquisition resulting from the law of prescription, his bounds remain where they did in 1844, and he has made nothing by his error.

No suit for ejectment is necessary in such a case as this, and a Court of equity having the facts within its knowledge, and being as it is, now seized of jurisdiction, may order the boundary lines fixed and that the titles of the contestants be quieted. A suit of ejectment is brought to try title. There is none here at issue, as neither party denies the title of the other, the only object of the suit being to keep each party within the lines of the distinct property that has in both instances been acquired from a common source.

There is no question in the case either of high or low lands, for it is clear that the party defendant bought lands of neither of such denominations, while it is equally certain that the lands of plaintiff were listed, selected, approved and set apart in 1852 by the highest authority of the United States, as part and portion of lands granted to the State of Louisiana under the Act of 1849, the status of said lands being thus fixed. French vs. Fyan et al., 3 Otto 169.

The lines were then fixed and determined in Section, Range and Township, and under authority equal to that fixing the limits and bounds of defendant's lands.

We respectfully suggest that we have clearly sh.wn that, whether at law or in equity, the position of plaintiffs or complainants is impregnable, and that a resort to the common law action of ejectment is uncalled for, and would be equally opposed to the rights of plaintiffs, whether at law or in equity. *Justicia fiat si cælum ruat.*

Respectfully submitted,

J. S. WHITAKER,

For Powell and Others.